IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 476 OF 1994

Shri B.B. Hugar,]
Superintendent, Central Excise &]
Customs Preventive, Headquarters,]
Pune.] .. Appellant

Vs

1. Shri Naushad Hasan Pathan, aged 21,]
2. Shri Hasan Ahmed Pathan, age Adult,]
[Both residing At Mangalwar Peth,]
Panchbatti Chowk, At & Post Phaltan,]
District Satara.]] .. Respondents

Mr. J.C. Satpute, Standing Counsel for Union of India, for the applicant.

Mr. V.M. Thorat with A.T. Gade for the respondent Nos.1 and 2.

Dr. F.R. Shaikh, A.P.P., for respondent No.3-State.

CORAM: S.S. PARKAR &
ANOOP V. MOHTA, JJ.

DATED: 9TH FEBRUARY, 2005

ORAL JUDGMENT.:

1. The respondents were charged, tried, but acquitted of the offence under Sections 18, 25, 20(b)(i) of the Narcotic Drugs & Psychotropic Substances Act, 1985 [for short "NDPS Act"]. Therefore, present Appeal against acquittal by the appellant.

2. As per the prosecution, on 9th October, 1988, on information, a raid was conducted by the Officers of the appellant-Central Excise & Customs Preventive, Pune, of the premises, comprising of two rooms, having its Municipal House No.7 and owned by respondent No.2, in village Phaltan, and found 1.340 kgs. of *"ganja"* under the sofa, and opium, weighing 52 gms., in the pocket of respondent No.1. After receiving the information, completed the formalities, including issuance of an authorisation under Section 41(2) of the NDPS Act by the competent authorities only in the name of respondent No.2, without mentioning the house number. The detail and purpose of the raid was explained to the Panchas. The Panchas were also searched. Nothing was found in the course of the said search. The raiding team reached to the premises in question. The door of the house was open. When called, respondent No.1 Naushad Hasan Pathan came out of the room. PW1, Mr. Sable, after disclosing his identity and authorisation, explained the purpose of their visit, in presence of two Panchas and also explained the contents of the authorisation and obtained left hand thumb mark of respondent No.1 on the said authorisation letter. Respondent No.1, thereafter took the search of PW1 and other Officers, including of the two Panchas. After completion of these formalities, PW1 along with the other Officers entered into the room.

3. PW1 Sabale thereafter asked respondent No.1 to give search of his person. The Superintendent Tatawade, a Gazetted Officer, asked respondent No.1 whether he wanted to be searched in presence of the Gazetted Officer or in presence of any Magistrate. Respondent No.1 consented for the search in presence of Tatawade. In the right side pocket of the pant of respondent No.1, a plastic bag containing 52 gms. opium was found. In the course of the search of the room, they also found two cloth bags under the sofa. One sealed bag weighed 1 kilogram and another, partly open, weighed 330 gms. They also found *ganja* in 17 small plastic bags under the sofa. A list of articles (Exhibit-15) was prepared, which included one scale with three weights and small empty plastic bags. The opium, as seized, was separately packed in two plastic bags, weighing 24 gms. each and sealed.

4. The 17 small plastic bags were also opened. Two samples, each weighing 24 gms., were separately prepared and sealed. The signatures of PW1 and two Panchas and thumb impression of respondent No.1 were taken on these documents. After completion of the formalities, the samples and other properties were taken into custody and accordingly, the Panchanama was

prepared, which was duly signed by the Panchas [Exhibit-16]. The copy of the Panchanama was also given to respondent No.1 on the spot The contents of the Panchanama were read over to respondent No.1 in presence of the Panchas and endorsement to the said effect was also made.

5. PW1 Inspector Sabale, as per the provisions and procedure as contemplated under Section 67 of the NDPS Act, gave notices to the said two Panchas. The statements of these two Panchas were also recorded. As respondent No.1 agreed to give statement before the Superintendent Mr. Tatawade in presence of PW1, Sabale, the Officer had also explained to the respondent No.1 that once the statement was recorded as per Section 67 of the NDPS Act, it would be used against him. The confessional statement was recorded on the same day. No reasonable time was given to the respondent No.1 before recording such statement. The statement of respondent No.1 was accordingly recorded and the same was scribed by one Inspector Sawant [not examined]. The statement was read over to him by one Balasaheb Bhosale [not examined] and the thumb impression of respondent No.1 was also obtained thereon. Respondent No.1 was arrested at 4.50 p.m. The respondent No.1 was produced before the J.M.F.C., Phaltan and he was remanded to jail at

Satara.

6. Inspector Sabale, PW1, thereafter submitted the detail report regarding search and seizure [Exhibit-19]. The Superintendent Tatawade, further submitted the Report to the Superior Officers. After completing the formalities, the sealed packets containing samples of *ganja* and opium were forwarded with the covering letter [Exhibit-20 & 23] to the Office of the Chemical Analyzer, Pune.

7. Respondent No.2, being the owner of the premises, was summoned by the various Notices as per the provisions under Section 67 of the NDPS Act. PW1 Inspector Sabale, on 22nd December, 1988, reached the house of respondent No.2 and informed him about the matter and personally served the Notice and asked him to give his statement. Respondent No.2, however, agreed to give his statement on the next day. PW1 Inspector Sabale showed to respondent No.2, the statement of respondent No.1 and the Panchanama dated 9th October, 1988, and obtained the thumb mark of respondent No.2 after recording his statement on 23rd December, 1988. The contents of the statement was also explained and read over to the respondent No.2. On the same day, at about 10.30 a.m., accused No.2 was arrested and produced

before the J.M.F.C., Phaltan.

8. As per the prosecution, these confession (Exhibit-17 & 27) made by the respondents were before the Officers of the Customs Department and not before the Police Officer and, therefore, admissible in evidence.

9. The Chemical Analyzer's Report (Exhibit-22) supports the prosecution case that sample No.1 was opium containing 0.8% morphine and sample No.2 was *ganja*. Therefore, Shri B.B. Hugar PW3, Superintendent, Central Excise and Customs Preventive Headquarter, Pune, the appellant herein filed the complaint against the accused on 17th January, 1990, after a lapse of about 14 months in the Court of the learned Judicial Magistrate, First Class, Phaltan. The case was thereafter committed to the Court of Sessions and heard accordingly. The prosecution has examined three witness viz. PW1, Inspector Sabale who carried the search and seizure, PW3, complainant Shri B.B. Hugar and PW2, Shri Mahamuni, the Panch. The prosecution had also relied upon various documents. The learned Judge, based on the material on the record, by the impugned judgment dated 28th April, 1994, acquitted the respondent Nos.1 and 2. An application under Section 340 of the Criminal

Procedure Code (for short "Cr.P.C.") was made by the prosecution against PW2 Shri Mahamuni for committing perjury. However, no action was taken by the learned Judge. Therefore, this Appeal against the acquittal order.

10. Heard the learned counsel appearing for the appellant Mr. J.C. Satpute and Mr. V.M. Thorat for the respondents. We have gone through the records, and the authorities cited by the parties. The basic submission made by counsel for the appellant is that the judgment is contrary to the facts and law, as all the necessary and mandatory provisions of the NDPS Act viz. Sections 41(2), 42(2), 50, 53(a) and Section 67, were complied with, but still the learned Judge, on technical aspects, passed the order of acquittal. The confessional statements made before the Customs officials can be used as substantial evidence against the maker and it is a material piece of evidence collected by the Customs official under Sections 108, 110, 111 and 135 of the Customs Act, 1962 (for short "Customs Act"). Therefore, such confessional statements, although retracted, are binding as Customs Officers are not Police Officers as contemplated under Sections 24, 25 and 30 of the Evidence Act. The learned Advocate further contended that such statements, even if

recorded without complying with Section 164 of the Cr.P.C., are binding. He further contended that irregularity in mentioning the house number in authorisation letter and/or putting any material to support the ownership of the house in question by itself cannot be the reason to acquit the the accused. Counsel appearing for the accused-respondents resisted the above contentions raised by the appellant's counsel. In addition to that, he submitted to maintain the impugned order of acquittal.

11. The prosecution, according to us also, failed to establish, beyond reasonable doubt, that the Municipal House No.7 in question was owned by respondent No.2. The authorisation letter (Exhibit-14) nowhere mentioned house No.7, owned by respondent No.2. Inspector Sabale PW1, however, has stated in his evidence that they searched house No.7 owned by the respondent No.2. Respondent No.2 was not present when the raid was conducted. It is also not the prosecution case that respondent No.1 was owner and in exclusive possession of the place. The extracts of the searched premises (Exhibit Nos.30 and 31), were not of house No.7. The record shows that the complaint (Exhibit-1) was filed along with two extracts in respect of City Survey No.690 and 691 situated at Phaltan. As per

Inspector Sabale, PW1, the house searched was Municipal House No.7. There is nothing to connect the extracts (Exhibit-30 and 31) with house No.7 in question. The prosecution was unable to explain why the record in respect of Municipal House No.7 was not produced and why the extracts at Exhibits 30 & 31 were produced on the record. There is nothing to support that the respondents have any connection or concern with Exhibits 30 & 31 i.e. City Survey No.690 and 691. This inconsistency in the statement, as well as, in the documents produced by the prosecution in reference to the place of search, therefore, raises doubts.

12. As per the prosecution, respondent No.1 was living with the respondent No.2 in house No.7 situated at Phaltan. The accused have produced the assessment list in respect of house No.7 at Exhibit-37. The name of respondent No.2 is not recorded as the owner of Municipal house No.7. However, in view of the confessional statement of the respondent Nos.1 and 2 (Exhibit-17 & 27), at the relevant time, both the accused were living together in Municipal House No.7. As per the information report (Exhibit-13) and the authorisation letter (Exhibit-14) both the rooms in question belonged to respondent No.2. The authorisation (Exhibit-14) was for taking search of these two rooms.

However, the Seizure Panchanama (Exhibit-16) and the evidence of Inspector Sabale, PW1 shows that the search was confined only to one room. This unexplained circumstance shows breaches of various procedure and provisions as contemplated under the NDPS Act. The authorisation under Section 41(2) of the NDPS Act dated 9th October, 1988, was only in the name of Shri Hasan Ahmed Pathan (respondent No.2) and the authorisation was to search the said premises.

13. PW2, Mahamuni, was the Panch witness to the Search and Seizure Panchanama. However, he was declared hostile. As noted, the prosecution has, in fact, moved an application under Section 340 of the Cr.P.C. to take appropriate action for perjury against this witness. He was duly cross-examined by the prosecution wherein he admitted his signature on the authorisation (Exhibit-14), Seizure Panchanama (Exhibit-16) and the sealed packets (Articles 2 to 4). Therefore, even if it is assumed, as sought to be contended by the counsel appearing for the appellant, the testimony of such hostile witness cannot be discarded totally. There is no doubt that the law in this regard is settled. But we cannot overlook that the testimony of such witness needs cogent and clear corroboration from other circumstances or material on the record. In the present case, the

prosecution has failed to place on the record such material to prove their case of search of the premises i.e. house No.7, in question owned by respondent No.2, at the relevant time. The prosecution case, in view of this inconsistency and lacuna, raised various doubts. The evidence of PW2 Mahamuni, in this background, is difficult to accept. PW3 Shri B.B. Hugar, the complainant, admittedly had never witnessed the search and seizure in question. The complaint was lodged on the basis of the information and material collected and given by PW1 Inspector Sabale. We have also noted that in his evidence B.B. Hugar, PW3, could not tell whether the raid was affected in both C.S. Nos.690 and 691. This also further supports the defence submission that the authorisation and/or raid was not concerned with Municipal House No.7. Therefore, it is difficult to accept the prosecution case even based on this witnesses and documentary evidence on the record. The prosecution has failed to prove that the contraband material was found in possession of the accused-respondents from the house No.7 in question. In the facts of the present case, therefore, as admittedly the Officer who had issued the authorisation letter in question was not examined.

14. In this case, the mandatory procedural

compliances, as contemplated under Section 42 and 50 of the NDPS Act, have not been complied with. These basic lacunas, therefore, go to the root of the matter and raise various doubts.

15. The search and seizure of opium from the person of respondent No.1 was also not in compliance with the safeguards as provided under the provisions of Section 50 of the NDPS Act. As already noted above, the Panch witness PW2, Mahamuni, to the Search and Seizure Panchanama (Exhibit-16) of the house and the person of respondent No.1, was declared hostile. There is nothing on the record to show that the rights, as provided under Section 50 of the NDPS Act, had been explained and the same was recorded by the concerned Officers at the relevant time. There is no doubt as declared by the Apex Court in **(2003) 8, S.C.C., 449** [M. Prabhulal Vs. Asstt. Director, Directorate of Revenue Intelligence] that the procedure, as contemplated under Section 50, is applicable only to the personal search and it is not applicable to the search and seizure of any conveyance or other premises. The Apex Court has **held in 2002, Cri.L.J., 2529 [Beckodan Abdul Rahiman Vs. State of Kerala]**, based on the judgment reported in **AIR 1999, S.C., 2378** [State of Punjab Vs. Baldev Singh, etc. etc.] reiterated as under:

> "After referring to host of judgments the Constitution Bench of the Court held that the provisions of Sections 42 and 50 are mandatory and their non compliance would render the investigation illegal. It was reiterated that severer the punishment, greater the care to be taken to see that all the safeguards provided in the statute are scrupulously followed. The safeguards mentioned in Section 50 are intended to serve a dual purpose to protect the person against false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer. If the empowered officer fails to comply with the requirements of the Section, the prosecution is to suffer for the consequences."

The Apex Court, in the above case, acquitted the accused as there was non-compliance of the basic safeguards, as referred above. We have also seen that there is no endorsement to that effect made by the concerned Officer and nor it has been supported by any independent witness that the said Officers that the accused was apprised of all rights as conferred under Section 50 of the NDPS Act by giving him the option to the search being made in presence of a Gazetted Officer or a Magistrate. It is only in the testimony of Inspector Sabale, PW1, that it was asserted that the safeguards had been complied with. The Apex Court in **2002, Cri.L.J., 1006** [State of Haryana Vs. Vikram Singh] have maintained the order of acquittal of the accused from the charges under the NDPS Act as the prosecution failed to establish by

documentary evidence that they had informed the accused about his rights of being searched before a Gazetted Officer or a Magistrate.

16. In the present case also, there is no documentary evidence to support the aforesaid compliance. Once the accused denies such facts and there is no documentary evidence or any material in writing to support the same, mere oral testimony of such Officer/Inspector is difficult to be believed. In the present case, both the accused are illiterate. The Seizure Panchanama nowhere mentions the fact that the respondent No.1 was informed about his rights to be searched in the presence of a Gazetted Officer or a Magistrate. There is no such recital even in the Seizure Panchanama (Exhibit-16), which remained unexplained by the prosecution. The Panch witness to the said Search and Seizure was declared hostile. There is no statement recorded anywhere that the accused had waived his right to be searched in the presence of a Magistrate or other Gazetted Officer. We see there is no illegality or perversity in the reasoning given by the learned Judge in this regard. The Apex Court's decision, as relied by the appellant in **2000 S.C.C. (Cri.), 300** [Joseph Fernandez Vs. State of Goa] in the facts and circumstances of the case, is distinguishable

and the judgment relied by the accused in State of Haryana & Becodan Abdul Rahiman (supra) which is subsequent judgments, based on the Constitutional Bench judgment in State of Punjab Vs. Baldev Singh (supra) and which supports the facts and circumstances of the present case. The prosecution has failed to prove that respondent No.1 was in possession of opium at the relevant time.

17. We have also noted in the present case that respondent No.1 is not the owner of Municipal House No.7. Respondent No.2 on the record, is also not the owner of Municipal House No.7. As per the authorisation letter, the search which was conducted, was of C.S. No.690 and C.S. No.691. The secret information therefore, if any, was pertaining to C.S. No.690 and C.S. No.691 as per the complaint itself and not of Municipal House No.7. Accused-respondent No.2 was not present at the time of search and seizure. Therefore, it is difficult to accept the prosecution’s case that respondent No.2 was in conscious possession of the contraband material, specially *ganja*. Respondent No.1, even though was present in the house being a family member, cannot be said to be in conscious possession if such contraband material was found from a hidden place, as in the present case, was underneath the sofa. PW2,

Mahamuni, the Panch witness to the Search & Seizure Panchanama was declared hostile and for want of independent witness, except the testimony of PW1, Inspector Sable, such seizure of contraband goods, in the present facts and circumstances of the case, itself was not sufficient to convict the respondents. Even if we assume that some evidence of such hostile witness can be taken into consideration, but, in the present case, the remaining testimony of this witness was not trustworthy and did not support the prosecution case because of prosecution's own lacunas and unsupportive material on the record. It is not the case of the prosecution that they discovered the said contraband goods at the instance of respondent No.1. It is during the search that they found the contraband goods and other material under the sofa. Respondent No.2, therefore, apart from other circumstances, cannot be said to be in conscious possession of the contraband goods in question. In view of the above lacunas, therefore, it is difficult to accept the prosecution case that the accused were in conscious possession of the contraband material.

18. The last important question is whether the confessional statements of the respondent Nos.1 and 2 (Exhibits-17 & 27) itself are sufficient to convict them

for he offences charged under the NDPS Act. In the present case, the learned Advocate appearing for the appellant, therefore, basically relied upon the following judgments in support of his submission. The Apex Court, after considering various other judgments, in **(1997) 3 S.C.C., 721** [K.I. Pavunny Vs. Asstt. Collector (HQ) Central Excise Collectorate, Cochin] has crystallized the issue as **under:**

> "25. It would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. Practice and prudence require that the court could examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The court is required to examine whether the confessional statement is voluntary; in other words, whether it was not obtained by threat, duress or promise. If the court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base the conviction. However, prudence and practice require that court would seek assurance getting corroboration from other evidence adduced by the prosecution."

19. The Apex Court in the following judgments viz.

1995, Supp.(4) S.C.C., 663 [Naresh J. Sukhwani Vs. Union of India]; **(1997) 1, S.C.C., 508** [Surjeet Singh Chhabra Vs. Union of India & Ors.] and **(2000) 7, S.C.C., 53** [Asstt. Collector of Central Excise, Rajamundry Vs. Duncan Agro Industries Ltd. & Ors.] held that the confession made before Customs official, although retracted, is binding as Customs officials are not Police Officers, as contemplated under Section 25 of the Evidence Act. It is further held that the statement made before the Customs official is not a statement recorded by a Police Officer under Section 161 of the Cr.P.C. It is a material piece of evidence collected by the Customs officials under Section 108. Therefore, it can also be used as substantive evidence not only against him, but also another person, as contemplated under Section 30 of the Evidence Act [Naresh Sukhwani (supra)]. A statement recorded under Section 108(3) of the Customs Act, without complying with Section 164 of the Cr.P.C. is admissible, subject to the conditions in Section 24, 25 and 26 of the Evidence Act read with Section 164 of the Cr.P.C. [Assistant Collector of Central Excise, Rajamundry (supra)]. The above settled principle needs no further elaboration.

20. The confessional statement of respondent No.1 - Naushad (Exhibit-17) was recorded by the Inspector,

Central Excise & Customs, an Officer under the Customs Act, on 9th October, 1988, as contemplated under Section 67 of the Act. The confessional statement of respondent No.2 was recorded by the Inspector, Central Excise & Customs, an Officer under the Customs Act, on 23rd December, 1988. The confessional statement of the respondent No.2 recorded, in the given facts and circumstances of the case, raises various doubts, specially when admittedly it was recorded after two and half months from the date of the incident. Such statement or such retracted statements, even if regarded as the basis for conviction, still, as declared by the Apex Court time and again, requires supportive corroboration from other evidence adduced by the prosecution. It is also necessary to see whether such confessional statement as voluntary and/or was not obtained by threat, duress or promise. It is also essential that such statement must be true and correct. Respondent No.2 was admittedly not present on the date and at the relevant time of the search and seizure in question. Municipal House No.7 was not the house mentioned in the authorisation letter in question. As per the complaint, the extract (Exhibits-30 & 31) which were part of the record, admittedly were not of House No.7. Respondent No.2, even if he was the owner of House No.7, in his absence, such search and seizure

cannot be the foundation to convict the accused under the NDPS Act. The requirement of conscious possession cannot be overlooked. In the present case, the Panch witness (PW2) is not supporting the prosecution case, being declared hostile and/or even otherwise. On 23rd December, 1988, the statement of the respondent No.2 was recorded as per the provisions of Section 67 of the Act. Based on the search and seizure Panchanama dated 9th October, 1988, as it was shown to respondent No.2, the confessional statement was made. If the seizure Panchanama itself remained to be proved, it is difficult to accept the prosecution case, based on any confessional statement made by respondent No.2. In the said statement itself, respondent No.2 has stated that House No.7 was not transferred in his name. In this background, it is difficult to accept the prosecution case and the conviction based on such confessional statement dated 23rd December, 1988.

21. Respondent No.1, even though was present at the relevant time in House No.7, as recorded above, the search and seizure Panchanama itself remained unproved as the Panch witness was declared hostile. The authorisation letter was in respect of C.S. No.690 and 891, which are not owned by the respondents. Municipal House No.7 was not owned or was not in exclusive

possession of respondent No.1 at the relevant time. The contraband goods were recovered under the sofa. In absence of positive evidence to show that respondent No.1 had full knowledge of the contraband material and/or its existence in the house at a given place, the conviction order under the Act is difficult to accept. We have also noted that the respondents have, in fact, denied their thumb impressions on these statements (Exhibits 17 & 27). The confessional statement of respondent No.1 was recorded on the same date and same time on 9th October, 1988 itself, without giving sufficient time to think, before giving such statement. It is necessary to give some reasonable time to such person to think or ponder over before making such self inflicting statements, specially when consequences are severe and drastic, otherwise such confession cannot be said to be voluntary or uninfluenced. Both the accused were illiterate. The scriber of the statements was not examined. Respondent No.1 was alone in the house. Respondent No.2 and other members of the family were not in the house. We have also noted that if the recovery of the contraband goods from the house mentioned in the authorisation itself if not established and proved, the possession of contraband, from the respondent, as sought to be contended by the prosecution also loses its strength, specially when the authorisation Officer

himself was not examined and no Panch witness was also examined to support the prosecution seizure and/or even the confessional statements - Exhibits 17 & 27.

22. The search and seizure in question took place on 9th October, 1998. The statement of respondent No.1 was recorded on 9th October, 1998. There is no sufficient material on the record to show as to why the statement of respondent No.2 was recorded on 23rd December, 1998. The respondent No.2 was arrested on 23rd December, 1988. The complaint was filed in the Court of Judicial Magistrate, First Class at Phaltan on 17th January, 1990. For this delay also, there is no proper justification.

23. In view of this, we are also of the view that the prosecution has failed to prove that the respondents have contravened the provisions of Sections 18, 25 and 20(b)(i) of the N.D.P.S. Act. Therefore, we see no reason to interfere with the order of acquittal passed by the learned Judge. There is no substance in the Appeal. The Appeal is, therefore, dismissed.

[S.S. PARKAR, J.]

[ANOOP V. MOHTA, J.]

[srpasha@hc]